No. 12,986

ed States Court of Appeals

For the Ninth Circuit

NG FOO, *Appellant,*	
RD McGRATH, Attorney Gen- the United States, *Appellee.*	

BRIEF FOR APPELLEE.

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No. 12,986

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For the Ninth Circuit

ING FOO,	*Appellant,*
S.	
ARD MCGRATH, Attorney Gen-f the United States,	*Appellee.*

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

ppellant filed an action, pursuant to Section ne Nationality Act of 1940 (54 Stat. 1171; 8 903), in the Court below seeking a declara-gment that he is a national and citizen of the States.

ant arrived at the Port of San Francisco, Cal-on November 22, 1948 and applied for admis-he foreign born son of an American citizen. detained by the Immigration and Naturali-ervice and accorded a hearing before a Board al Inquiry convened pursuant to 8 U.S.C.

Wong Yem, and he was excluded as an alie
possession of a valid immigration visa. The
of the Board of Special Inquiry was upheld
Commissioner of the Immigration and Natur
Service and subsequently affirmed by the B
Immigration Appeals. The appellant then
complaint in the Court below seeking a j
declaring him to be a national and citizen
United States.

In the course of the trial, the certified recor
proceedings before the Immigration and Na
tion Service was introduced into evidence
objections of counsel for appellant. The lowe
found for the defendant and from that judgm
appellant now prosecutes this appeal.

ARGUMENT.

Appellant set forth the following points upo
he intends to rely:

1. The Court below erred in holding
pellant has failed to sustain the bu
establishing his relationship to his
Wong Yem, by a preponderance of evi

2. The Court below erred in admitting
sidering the records and transcripts
immigration proceedings other than t
scripts of testimony of the plaintiff

I.

[OFF]ICIAL RECORDS AND TRANSCRIPT OF THE ADMINIS-[TRAT]IVE PROCEEDINGS RELATIVE TO APPELLANT ARE [ADMI]SSIBLE IN EVIDENCE.

[A]ppellant in his brief first considered the sec-[ond poi]nt upon which he relies, that is "whether the [record a]nd transcript of the immigration proceedings [are ad]missible in evidence."

[Appel]lant emphasizes that 8 U.S.C. 903 (Sec. 503, [National]ity Act of 1940) contemplates a trial *de novo,* [and] assumes that such a trial precludes the trial [court fr]om considering evidence presented at the ad-[ministra]tive hearing.

[A]ppellee agrees that 8 U.S.C. 903 contemplates [a trial *d*]*e novo,* but disagrees as to the meaning and [interpre]tation of the term. It is believed that the [Honorab]le Judge Murphy correctly held, that in an [action su]ch as this, the Court should not only consider [the] evidence produced at the trial, but should also [consider t]he record prepared during the administrative [proceedi]ngs.

[A tria]l, pursuant to the provisions of 8 U.S.C. 903, [is an act]ion in equity to be tried without a jury, be-[fore a j]udge of a United States District Court. In [this typ]e of proceedings the "Hearsay Rule" is re-[laxed. (]31 *C.J.S.* Para. 210, page 945.)

[In] the admission and review of evidence in an [equi]ty case, the Court possesses a broad discretion [and] is very liberal in the admission of evidence on

nent to the issues will be considered.
Para. 478, 47 Fed. (2d) 621, 640.)"

When the Board of Special Inquiry found
pellant was not the blood son of Wong Yem,
in substance that *appellant was attempting*
to illegally enter the United States.

The Courts of the United States have recog
ability of the Immigration and Naturalizatio
to ferret out fraudulent claims to United S
tionality. This view was expressed by the
States Supreme Court in *Tulsides v. Insular C*
262 U.S. 258, at 265, wherein the Court state
lows:

"* * * leave the administration of the la
the law intends it should be left; to the
of officers made alert to attempts at
of it and instructed by experience of the
tion which will be made to accomplish eva

The present action is a suit in equity with
torical requirement that he who seeks equitab
must come into Court with clean hands. This
able Court in the case of *Hyland v. Millers*
Fed. (2d) 1003, affirmed 91 Fed. (2d) 735, r
denied 92 Fed. (2d) 462, certiorari denied
645, stated:

"In a case involving fraud, the Court ha
latitude in admitting evidence in every
stance relative to the condition and relatio
parties and subject matter and every

Jnited States Supreme Court, in discussing an
nvolving fraud, stated in the case of *Castle*
Bullard, 64 U.S. 172, 187:

here fraud is of the essence of the charge.
essarily give rise to a wide range of investi-
on, for the reason that the intent of the de-
lant is, more or less, involved in the issue.
erience shows that positive proof of fraudu-
acts is not generally to be expected, and for
reason, among others, the law allows a re-
to circumstances, as the means of ascertain-
the truth. Great latitude, says Mr. Starkie,
istly allowed by the law to the reception of
rect or circumstantial evidence, the aid of
ch is constantly required, not merely for the
pose of remedying the want of direct evi-
e, but of supplying an invaluable protection
nst imposition." (1 *Stark, Ev.* p. 58.)

any years this Honorable Court has recog-
at false claims to U. S. citizenship have been
l by persons seeking to illegally enter the
States. In the case of *Siu Say v. Nagle,* 295
, when considering a Chinese relationship
Honorable Court stated:

cases of this character experience has dem-
rated that testimony of the parties in inter-
as to the mere fact of relationship can not
afely accepted or relied upon."

norable Court then quoted from the *San-*
rinidad, 7 Wheat. 283-337 (5 L. Ed. 454):

as in relation to the country of his birt
ing in a vessel on a particular voyage
ing in a particular place, if the fact t
otherwise it is extremely difficult to exe
from the charge of deliberate falseho
courts of justice, under such circumsta
bound, upon principles of law, and mora
justice, to apply the maxim '*falsus in u*
in omnibus.'" (Italics ours.)

The appellant has cited the case of *Gan Se*
83 Fed. Supp. 482, in support of his argun
the immigration records should not have been
into evidence. Although the above case held a
under 8 U.S.C. 903 to be a trial *de novo,* th
did consider the immigration records as indi
page 486:

"There was put in evidence the vario
scripts of the proceedings had before the
mental officers and agencies."

Thus the Court considered the records subm
the government, along with the testimony giv
trial, and then found that the plaintiff had
sustain his burden of proof. The Court's att
also invited to footnote 3 on page 485 in th
cited case:

"There has just come to hand the op
George Holtzoff of the District of Colu
Mah Ying Og v. Clark et al., D.C. 81 Fe
696, 697, where the Court held and pro
that Sec. 503 'contemplates a trial de

e noted that the Court did not find, in the case *Ying Og v. Clark,* supra, that the records of inistrative hearing were inadmissible. The le Judge Holtzoff stated at page 697:

e 1940 statute, however, contemplates a *re-ing* and a full judicial hearing of the entire of citizenship without confining it *merely* to view of the administrative action." (Italics lied.)

iguage used by the Honorable Judge Holtzoff that in his opinion an action under 8 U.S.C. porates not only new evidence taken at the he trial, but also the *reopening* and *review* ntire administrative procedure. The Court ien, as was stated by the Honorable Judge in the case at bar, arrive at its own con-fter taking into consideration all the evidence.

gh the specific question as to the admissibility nmigration records into evidence under the s of 8 U.S.C. 903 has not been previously de-ier authorities indicate the record of an ad-ive hearing should be admitted into evidence. kman's Compensation Act provides by statute ring *de novo.* In the case of *Worn v. Ana-opper Mine Co.,* 43 P. (2d) 663, 667, the Court of Montana interpreted that statute ng *Dosen v. East Butte Copper Mine Co.,* 30 as follows:

e term 'de novo' as used in the statute, is

emphasize the fact that after all the statu
meant, *that all the evidence taken by th
and all of the additional evidence take
Ct. should be considered together and th
that evidence as a whole, the Ct. should
judgment.*" (Italics ours.)

The United States Code provides ample a
for the introduction into evidence of the imm
records objected to by appellant's counsel. 28
Sec. 1732 reads as follows:

"RECORD MADE IN REGULAR C
OF BUSINESS.

In any court of the United States an
court established by Act of Congress, a
ing or record, whether in the form of
in a book or otherwise, made as a mem
or record of any act, transaction, occur
event, shall be admissible as evidence of
transaction, occurrence, or event, if mad
ular course of any business, and if it
regular course of such business to ma
memorandum or record at the time of s
transaction, occurrence, or event or w
reasonable time thereafter.

All other circumstances of the making
writing or record, including lack of
knowledge by the entrant or maker, may b
to affect its weight, but such circumstan
not affect its admissibility.

The term 'business', as used in this sec

Courts, in considering the above section, in-
he functions of government agencies within
iition of the term "business".

lein v. United States, 8 Cir. 1949, 176 F. (2d) 184. Cert. den. 1949, 338 U.S. 870, 70 S. Ct. 145 (voting lists);

nited States v. Ward, 2 Cir. 1949, 173 F. (2d) 628 (Selective Service record);

orwood v. Great American Indemnity Co., 3 Cir. 1944, 146 F. (2d) 797 (Navy service record);

ollack v. Metropolitan Life Insurance Co., 3 Cir. 1943, 138 F. (2d) 123 (birth certificate);

unter v. Derby Foods, Inc., 2 Cir. 1940, 110 F. (2d) 970, 133 A.L.R. 255 (coroner's death certificate).

ourt, in the case of *Moran v. Pittsburgh-Des Steel Co.,* 86 F. Supp. 255, on pages 279-280, follows:

) The purpose of the exception of the hear-
rule, as I read the authorities, where refer-
is made to reports formulated by an agency
ie government by virtue of a congressional
ority is to make possible the presentment of
or circumstances which appear in that re-
where it is necessary to rely on what is
e report in order to avoid a miscarriage of
ce.

* * * * * *

Public records compiled in the regular

tion on the grounds that the inquisitio
quiry was in the nature of a judicial
ing wherein the right of cross examina
amply safeguarded and protected. * * *"

The United States Court of Appeals, 3rd
when considering the above case, stated as
on page 473 of 183 F. (2d) 467:

"The report is no less admissible becaus
tains conclusions of experts which are ba
hearsay evidence as well as upon obs
These circumstances, by virtue of expre
tory provision, go to weight rather tha
missibility."

The United States Court of Appeals for
Circuit stated in the case of *Klein v. Unite*
cited supra, on pages 187-188, as follows in
to voting records:

"Being public records made contempor
with the event which they reflect, they
sumptively correct and are 'writing o
* * * made as a memorandum or recor
act', within the meaning of Title 28 U.
695 (now 28 U.S.C.A. Sec. 1732); H
United States, 8 Cir., 143 F. (2d) 795;
v. Hoffman, 318 U.S. 109, 63 S. Ct. 477,
645, 144 A.L.R. 719. The argument of co
defendants goes to the effect or weight o
dence rather than to its admissibility."

Section 1733 of Title 28 U.S.C.A. is also a
and reads as follows:

:. 1733. GOVERNMENT RECORDS AND PAPERS; COPIES.

.) Books or records of account or minutes of department or agency of the United States l be admissible to prove the act, transaction or rrence as a memorandum of which the same : made or kept.

) Properly authenticated copies or tran- ots of any books, records, papers or documents ny department or agency of the United States . be admitted in evidence equally with the nals thereof. June 25, 1948, c. 646, 62 Stat. ,

lying the above statute to the case at bar, the f the Immigration Service are admissible to t the Board of Special Inquiry was held. In the transcript of the proceedings are pre- be correct. As to this latter point, counsel ppellant has not challenged the correctness ıthenticity of the documents offered in evi-

ant has cited as authority *United States v. ıro,* 63 F. Supp. 811, and as quoted by the ; on page 14 of his brief, the Court stated:

wever, not every oral or written extra judi- statement offered in evidence comes within ıearsay rule. It is only where the extra ju- l statement is offered to establish the truth ıe fact so stated that the hearsay rule can y. *Where the extra judicial statement is of-*

that the oral statement, in fact, was mad
written statement, in fact, exists, then the
is without the hearsay rule." (Italics ou

The immigration records were not intro
prove the truth of the words spoken. In
record is so interwoven with discrepancies
becomes obvious many of the statements ca
reconciled. It therefore follows that the
transcript was offered in evidence not to p
truth of the word spoken, but to establish t
oral statements were made.

The portion of the administrative record
the appellant specifically objected was the te
of his alleged uncle, Wong Gong. During th
of the administrative hearing, the appellant p
Wong Gong as a witness in his own behalf. T
ing conducted by the Board of Special Inqu
semi-judicial in nature. The parties in intere
the Board of Special Inquiry were the same a
before the Court below. The appellant was rep
by the same counsel who now brings this app
there was opportunity for cross-examinatio
witness. As a practical matter, the appellant k
records of the Board of Special Inquiry would
duced at the trial. Counsel for the appellant
to the Court's considering Wong Gong's te
given at the Board hearing. The following q
and answers appear on page 63 in the trans
record:

he other proceeding. He is introducing his
mony. I believe in order to have his testimony
re the Court he should produce the witness.
ne Court. Why don't you produce him?
r. Chow. In the first place, I have asked the
ess whether he is available and he is working
ne city, and——
ne Court. You have the process of the court
lable to you.
r. Chow. I don't want to subject him to loss
ages, your Honor.
ne Court. All right."

e above testimony, it appears that the only
dvanced by the appellant for the non-produc-
Vong Gong, was that it might subject him to
ages.

ppellant alleges that the defendant below had
of presenting Wong Gong as a witness. Such
not consistent with the facts. The appellant
hat he is the nephew of Wong Gong, and
allegations that he could not have produced
ne time of the trial. In fact, from the state-
Mr. Chow, supra, it appears that Wong
s available as a witness. Under such cir-
es, a strong presumption arises that had
ong been called as a witness, his testimony
ve been adverse to the appellant.

onorable Judge Murphy, relative to the ap-
of Wong Gong as a witness, stated in his

"* * * Testimony of the alleged uncle
in that he was the only witness presente
plaintiff who could establish a link of
between the adult now seeking admission
six year old boy that Wong Yem purport
left in China. His refusal to identify Wo
Foo and his denial of plaintiff's testim
given great weight by the Immigration
ment. Plaintiff knew this. He could n
seeing the shadow it threw over his cla
significantly, he made no effort to brin
Gong before this tribunal. He charge
brief that Wong Gong lied—yet he was
not to put the lie to him before this cou
an omission hardly accords with plaintif
ent protestations of forthrightness."

Should one party fail to produce an essen
ness, where he has the power to do so, a str
sumption arises that if the witness was prod
testimony would be against him. In the case
v. Venetian Blind Corporation, et al., 21 I
913, affirmed 111 F. (2d) 455, the Court stat

"and applying the familiar rule that wh
is material testimony to establish a fact
in the present ability of the litigant to pre
(he) fails to do so, or offers a reasonable ex
such failure, *the presumption follows tha*
timony, if presented, would be against su
Mammoth Oil Company v. United Sta
U.S. 13, 48 S. Ct. 1, 72 L. Ed. 137." (Itali

The United States Supreme Court in M

Familiar rules govern the consideration of
ence. As said by Lord Mansfield in *Blatch v.
ier* (Cowper 63-65): 'It is certainly a maxim
all evidence is to be weighed according to
proof which it was in the power of one side
ave produced, and in the power of the other
ive contradicted.' " (page 51.)

ge 52, quoted *Commonwealth v. Webster*, 5
5, 316:

But when pretty stringent proof of circum-
ces is produced, tending to support the
ge, and it is apparent that the accused is so
ted that he could offer evidence of all the
and circumstances as they existed, and show,
ch was the truth, that the suspicious circum-
ces can be accounted for consistently with his
cence, and he fails to offer such proof, the
ral conclusion is that the proof, if produced,
ad of rebutting would tend to sustain the
ge."

ellant is not in a position to complain that
ess, Wong Gong, was not produced, when it
in his power to do so.

icago M. St. P. & P. R. Co. v. Slowik, 184
F. (2d) 920.

urt's attention is invited to the untenable po-
which the government would be placed, should
allowed to introduce into evidence the rec-
ts administrative hearings. The Court may
cial notice that there are few, if any, public

Government has evolved a system of reco
genealogy of Chinese claimants to United S
tionality. These records constitute the best
available, and are in most instances the or
mentary evidence, to assist the Courts or
trative agency, in determining the veracity
to United States nationality, made by perso
Mongolian race.

In practice, the records of the family his
superior to the testimony of the parties in
and in effect constitute the best evidence.
may be seen that the appellee when defend
type of action, has nothing on which to rel
the record and transcript of the administra
ceedings.

II.

IT WAS INCUMBENT UPON APPELLANT TO ESTA CLEAR AND CONVINCING EVIDENCE HIS C UNITED STATES NATIONALITY.

The appellant's first point asserts that the C
low erred in holding that appellant had faile
tain the burden of establishing his relationsh
father, Wong Yem, by a preponderance of e
The appellant contends that if the immigra
ords were not admissible in evidence, then
made out a *prima facie* claim to United St

ppellee asserts that the immigration records
nissible in evidence, and therefore the Court
roperly found that appellant had failed to
he burden of establishing his relationship to
'em. The appellee further contends that a
ima facie showing is insufficient to estab-
s United States nationality.

erson arriving at a port in the United States
s to enter as a citizen and national must
he burden of proof in establishing his na-
The burden rests on a Chinese applicant for
n to the United States to prove that he is the
American citizen.

ynn ex rel. Yee Suey v. Ward, 104 F. (2d)
900;
un Kock Quon v. Proctor, 92 F. (2d) 326;
ng Yen Loy v. Cahill, 81 F. (2d) 809;
ong Choy v. Haff, 83 F. (2d) 983;
on Ying Loon v. Carr, 108 F. (2d) 91.

s a natural presumption that a person of the
ace is an alien and not a citizen of the United
n the case of *Ex parte Lung Wing Wun*, 161
212, 213 (habeas corpus action involving the
Chinese person to return to the United States
visit to China—hearing on the merits), the
ted:

*ere is a natural presumption that a person
e Mongolian race coming to this country from
a, is an alien,* and to overcome that presump-

convincing evidence is essential, becaus
proceeding or inquiry having for its o
lawful determination of questions aff
claim to citizenship asserted by such a
he is himself an exhibit, his language,
and physical appearance must be consi
evidence tending to prove his alienage, a
out evidence sufficient to create a belief
a person is, notwithstanding his alien p
a citizen by birth, *the natural presumptio*
into a legal conclusion." (Italics ours.)

In the case of *Lee Sim v. United States,* 21
435, the Circuit Court of Appeals, 2d Circui
stated:

"In these deportation proceedings th
natural presumption that a person of t
golian race is an alien and it is essential
evidence to overcome it and to show that
is entitled to the privileges of citizensh
United States should be clear and con
(Italics ours.)

In the case of *Ex parte Chin Him, et al.,* 22
133, the District Court of New York (1915) s

"and finally, as was held in Lee Sim v
States, supra, there is in a proceeding to
person of the Mongolian race, *a natural p*
tion that he is an alien, which can only
thrown by clear and convincing e
(Italics ours.)

As stated supra in *Siu Say v. Nagle* e

as to the mere fact of relationship cannot be cepted or relied upon. This principle is also d by Justice Field of the Supreme Court of ed States, when writing the opinion of the the case of *Quock Ting v. United States*, 140

the authorities cited, supra, it is well estab- at a person applying for admission into the tates as a foreign born citizen must estab- citizenship by *clear and convincing evidence.* requires more than a mere *prima facie* show- he person is a citizen of the United States.

tions were issued pursuant to the statute ich the present action was filed. Sec. 112.2 R. deals with persons arriving in the United r the purpose of prosecuting, before the eir claim to United States nationality. The n follows the presumption that all such per- ying for admission to the United States are to be aliens and not citizens of this country.

CONCLUSION.

pellee respectfully submits that 8 U.S.C.A. 503 of the Nationality Act of 1940), con- a trial *de novo* in which the Court, sitting t of equity, should consider all the evidence, both a review of the administrative pro-

trial. The Court should then arrive at its
clusion based on all the evidence before the

It is well known that fraud abounds in rel
cases. The finding by an Administrative B
the claimed relationship does not exist rais
ference of fraud. To exclude the testimony
the Administrative Hearing would place
judge in a very precarious position. He
forced to make a decision with only a porti
evidence before him. Such a procedure co
in the lower Court declaring alien impost
citizens of the United States.

United States nationality is a prized posses
it is impossible to compute its value in
terms. Men have for years committed all m
crimes in an effort to be recognized as citize
United States. The Courts in the years p
taken cognizance of the many and varied att
establish, through fraud, false claims to A
nationality. As a natural result, a person o
birth, arriving for the first time in the Unite
has been required by the Courts to prove
and convincing evidence that he is, in fact, a
this country. Such a requirement is proper
consider that the United States is a sovereig
with the inherent power and obligation to p
people and property from aliens of other lan
submitted that the judge in the Court below
stated the law when requiring the appellant

a preponderance of evidence, that he is a
' the United States.

therefore, respectfully requested that the
: for the defendant awarded by the Court
affirmed.

San Francisco, California,
October 10, 1951.

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RGREAVES,
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ie Brief.